United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1040

B P/S

IN THE

United States Court of Appeals

For the Second Circuit

No. 75-1040

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

DANIEL JORDANO, ANDREW JORDAN and ANTHONY MUFFUCCI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT DANIEL JORDANO

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Preliminary Statement

The Appellant, Daniel Jordano, hereby appeals from a Judgment of Conviction entered in the United States District Court for the Southern District of New York (Carter, J.) adjudging him guilty of violating the federal bank robbery statutes, Title 18, United States Code, Section 2113 and conspiracy to violate those statutes in violation of Title 18, United States

Code, Section 371. As a result of this conviction, the Appellant was sentenced to concurrent terms of five years imprisonment on each of the three counts of the Indictment.

The Indictment appears on page eight (8) of the Appellant's Appendix.

STATEMENT OF THE FACTS

The Government charged that Appellant, together with defendants Andrew Jordan and Anthony Muffucci[1/] produced and directed the robbery of federally insured funds from an Assistant Branch Manager of the Yonkers Savings Bank.[2/] The actual robbery was committed by one Charles Hodges and Kenneth Williams. Both Hodges and Williams testified at trial.[3/]

(Footnote on next page).

1/ Andrew Jordan, a/k/a Andrew Jordano, Appellant's brother, and Muffucci were convicted with Appellant and similarly appeal their convictions to this Court.

2/ The Bank Manager, Ronald Corbia, was originally named as a defendant in the Indictment. At an earlier trial, which resulted in a hung jury as to Appellants Jordan and Muffucci, Corbia was acquitted. At that earlier trial, held in November, 1974, Jordano, Jordan and Muffucci were acquitted on a fourth count which charged bank embezzlement.

The Government established that on Friday, September 21st, 1973, Assistant Manager Corbia and Michael Novotny, another bank employee, were the victims of two robbers who stole $36,500 being transported from a commercial bank to a branch of the Yonkers Savings Bank. (T 45)[4/] Charles Hodges, originally a defendant who pleaded guilty to count three of the Indictment, confessed that he committed the robbery. (T 83 - 84) The architects of this endeavor, according to Hodges, were the defendants, Jordano, Jordan and Muffucci. Hodges testified that in April or May of 1973 Muffucci asked him whether he was interested in "making money" with minimal risk. (T 61) One month later, Hodges met Daniel Jordano, who also allegedly spoke about a "job" and "making money". (T 62) Hodges testified that the first meeting took place in

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3/ At this trial, Williams was called not by the prosecution, but by the defense. (T 463) Although Williams implicated the defendants, his testimony was at such variance with Hodges' testimony that doubt would be created by comparison of the two. Apparently, the jury did not believe that this was a reasonable doubt.

4/ The letter "T" refers to the trial transcript while the letter "A" introduces reference to the Appellant's Appendix.

a 1973 dark blue Cadillac. (T 62)[5/] At the second meeting, Hodges indicated that he would choose an accomplice to aid him in the robbery. (T 62 - 63)

Following this meeting, Hodges approached Kenneth Williams, who accepted the "job" offer. (T 63 - 64) The next time the robbery was discussed was when Appellant and Muffucci took Hodges to meet Andrew Jordan in late July of 1973. (T 65 - 66) On this occasion, the conspirators explained the details of the robbery to Hodges. (T 67 - 68) According to Hodges, this meeting was followed by a trip to the bank vicinity in order to "case" the area. (T 69)

It was not until Tuesday, September 18th, that Hodges again met with the Jordanos and Muffucci. (T 70 - 71) Hodges was picked up by the defendants in their Cadillac and the foursome proceeded to meet Kenneth Williams. (T 72) At this meeting, the conversation again focused on the robbery which

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[5/] Through a subsequent Government witness, the Government sought to establish that the defendants had leased cars similar in appearance to those described by Hodges and Williams. (T 478 - 483)

was planned for that Friday, September 21st. (T 72)

Hodges testified that the night before the robbery, all conspirators met and went to an apartment in Yonkers. (T 75 - 76)[6/] The next day, according to plan, Hodges and Williams took the money bag from the manager and jumped over a fence. (T 84)

Hodges testified that there were two getaway cars waiting nearby - one driven by Anthony Muffucci and one by the Appellant. (T 84) Hodges stated that he threw the money into Muffucci's car and entered Jordano's car. (T 84) Williams, however, never made it to the getaway car. (T 84) In fact, the next time Hodges spoke to Williams, they were both under arrest. (T 85)

On cross-examination, Hodges was excoriated with factual inconsistencies and failures of recollection. (e.g., T 106, 107, 165 - 168, 207 - 208) Additionally, by exploration of charges pending against him, it was established that Hodges

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6/Hodges stated that he did not see Muffucci until he awoke the following morning. (T 77)

had a strong motive to testify. (T 198 - 205) Defense counsel also sought to establish that Hodges knew these defendants not through any robbery scheme but because he had worked for Nationwide, a company owned by the defendants. (T 207)

Realizing the inherent danger in relying on accomplice testimony of this character, the Government sought to corroborate Hodges with circumstantial evidence. The Government elicited from Hodges that he had Anthony Muffucci's telephone number during this period of time. (T 85) A witness from the New York Telephone Company established that the number was unlisted. (T 267) Christine Dial, a friend of both Williams and Hodges, testified that she saw the pair during the summer in the company of "white men" who drove a blue Cadillac. (T 273)[7/] These observations were made on three separate occasions. (T 273) In fact, Miss dial saw the robbers in the company of "white men" in a blue Cadillac two days before the robbery. (T 274) The witness learned that one of these men was named Tony. (T 289) The night before the robbery, Hodges and

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7/ For whatever relevance, Hodges and Williams are black and each of the defendants is caucasian.

Williams were present in Miss Dial's apartment. (T 275)

Perhaps the most controversial witness to testify at trial was Nancy Willis, a girlfriend of Daniel Jordano. (A 22) During the Grand Jury's investigation of this case, Willis testified that she overheard a conversation among five men, including the Jordano brothers, where reference was made to a "bank messenger who carried some sums of money." (A 15) At this trial, as in the first, Miss Willis denied that she had overheard such a conversation. (A 25) She stated that she did not recall such a conversation. (A 25) On this foundation, the Grand Jury testimony was admitted into evidence and read to the jury. (A 26 - 27) This witness, on her direct testimony, was also impeached with statements that she allegedly made to law enforcement officials. (A 27 - 30)

After cross-examination as to why she had made the statements in the Grand Jury which she repudiated at trial, Willis was adopted as a witness for the defense. (A 48) Willis testified during this examination that she was with Danial Jordano from 5:30 on the evening before the robbery until after noontime on the following day. Willis testified that the couple spent the evening and morning hours in Lake Mohegan some forty-five minutes from the Yonkers Bank. (A 48 - 51)

While in Lake Mohegan, a telephone call was received by one Patricia Murphy. The phone was answered by Daniel Jordano. (A 48 - 49) On the defense case, Patricia Murphy testified that on September 21st, 1973, she was employed by the N.F.I. Employment Agency in White Plains. The agency was owned by Nancy Willis. (T 721 - 722) At approximately 10:00 or 10:30 in the morning, the witness called Miss Willis' residence in Lake Mohegan. Mrs. Murphy testified that the phone was answered by Daniel Jordano whose voice she recognized. (T 727 - 728) Daniel Jordano came into the agency together with Miss Willis "around 12:00 noon." (T 724 - 725)

Willis' testimony was followed by the testimony of three law enforcement officials who testified to oral statements made by Miss Willis during police interviews. (T 392, 403 - 410) This testimony will later be discussed in detail as it is relevant to Appellant's principal attack on appeal.

The Government's case concluded with the testimony of Donald Hodges, the brother of the robber-witness. (T 416) Like Miss Dial, Hodges saw his brother and Kenneth Williams in the company of "white men" who drove a blue Cadillac during the summer of 1973. (T 417) Donald Hodges then identified Daniel Jordano and Anthony Muffucci as the persons seen in his

brother's company. (T 417 - 418) On the evening of September 20th, 1973, Hodges saw this blue Cadillac in the neighborhood but could not identify the occupants. (T 419)

The Government's case was strongly contested by the defense. In addition to the alibi evidence supplied by Miss Willis and the testimony of Patricia Murphy, the defense called eight witnesses including the defendant Andrew Jordan to establish alibi defenses for each of the three defendants. (T 610, 626, 637, 653, 674, 720, 783, 812) Two witnesses placed Anthony Muffucci in Albany, New York at the time of the robbery. (T 783 - 790, 812 - 815) Andrew Jordan's account of his whereabouts at the time in question was supported by the testimony of his wife (T 653) and three co-workers. (T 610, 626, 637).

STATUTES INVOLVED

Title 18, United States Code, Section 2113, states as follows:

> "§ 2113. Bank robbery and incidental crimes.
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny --

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan

association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Administration."

Title 18, United States Code, Section 371, states as follows:

"§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any such purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

QUESTION PRESENTED

Whether it was error for the Trial Court to admit extrinsic evidence of hearsay statements allegedly made by a Government witness who denied making these statements?

ARGUMENT

THE CONVICTION HEREIN WAS TAINTED BY THE ERRONEOUS ADMISSION OF DAMAGING HEARSAY WHICH PREJUDICED APPELLANT'S RIGHT TO A FAIR TRIAL.

I

This was not a case where proof of defendants' guilt was overwhelming.[8/] Nor was this a case where the defendants failed to supply a credible exculpatory version.[9/] To the contrary, this was a classic case where the credibility of the Government's witnesses was squarely matched against the credibility of witnesses called by the defense. This observation is necessary to appreciate that whatever barometer the jurors used in reaching their factual determination could have been easily influenced by the erroneous admission of incompetent evidence. In cases of this sort, the Trial Court's rulings must reflect increased sensitivity to probable prejudice which may result from the introduction of such evidence.

8/ Witness the fact that at the first trial, the jurors rendered a partial verdict of acquittal and were unable to agree on the remaining counts.

9/ United States v. Frank, 494 F.2d 145, 153 (2nd Cir., 1974).

This appeal explores the complex interrelation between the rule prohibiting hearsay to establish guilt, impeachment testimony and the effectiveness of instructions designed to limit the evidentiary purpose of the hearsay testimony. This contention of error focuses on the testimony of Nancy Willis, the girlfriend of Daniel Jordano, who, as in the first trial, was called as a witness for the Government.

As developed in the Statement of the Facts, Willis testified before the Grand Jury and gave evidence which was concededly favorable to the prosecution. In relevant part, that testimony was as follows:

> "Q Specifically, directing your attention to August of 1973 or late in July, did you go to a bar in Yonkers by the name of the White Bridge Bar?
>
> A Yes, I did.
>
> Q And while you were in the White Bridge Bar, were you seated at the bar with Danny Giordano (sic), Andy Giordano (sic) and two or three other white men whose names you don't know?
>
> A Yes.
>
> Q And did you overhear a conversation among the five men, that is Danny Giordano (sic), Andy Giordano (sic) and two or three others whose names

you don't know --

A Yes.

Q -- regarding a bank messenger or bank employee who carries money from one bank to another?

A Yes, I did.

Q Could you tell us, in your own words, exactly what you best can recall was the substance of that conversation that you overheard?

A Well, I only heard bits and pieces of the conversation. They were talking about knowing somebody - knew someone who was either friends with or knew somebody who was a bank messenger who carried some sums of money, but no names were mentioned." (A 14 - 15)

At trial, as the Government well knew from previous experience with Miss Willis (T 7), the witness repudiated this testimony.

"Q Now, directing your attention to the two specific occasions which you recall these three gentlemen being together, can you tell us when they were together and where they were together?

A You mean in the summer of 1973?

Q In the summer of 1973.

A Well, those occasions were in a bar in Yonkers.

Q Both of the occasions?

A Yes.

A Yes.

Q What was the name of that bar?

A The White Bridge.

Q Direct your attention to both of those occasions, did you ever overhear any conversations between Andrew Jordan and Daniel Jordano at the White Bridge Bar?

A Well, only a few words here and there. Nothing that I could be specific about.

Q Well, did you ever overhear either of them talking about a bank manager or bank or the transfer of funds?

A To each other?

Q That you overheard.

A No.

Q Did you ever overhear such a conversation at which other people including Daniel Jordano and Andrew Jordan were present?

A No.

Q Are you certain that you can't recall such a conversation?

A Nothing specific, no." (A 24 - 25)

Following accepted procedure, the witness was shown her Grand Jury testimony in an effort to refresh her recollection. (A 25 - 26) The effort was unsuccessful.

"Q Does that refresh your recollection as to whether you overheard any conversation of the nature I have described between Daniel Jordano and Andrew Jordan in the White Bridge Bar in the summer of 1973?

A No, that does not make me remember a conversation." (A 26)

Following this denial, on the authority of United States v. De Sisto, 329 F.2d 929 (2nd Cir., 1964), the Grand Jury testimony was admitted as affirmative evidence that this conversation was overheard by the witness. (A 27)[10/] Appellant's claim of error does not focus on this ruling. However, the foundation for this ruling - repudiation of the witness' former testimony before the Grand Jury - frames the issue now at bar.

Following the introduction of the Grand Jury testimony, the Government attorney proceeded to "impeach" the witness. Appellant, Daniel Jordano, contends that there was an improper foundation for impeachment; that the manner in which the witness was ultimately impeached was grossly improper; and that

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10/ This Court's most recent discussion of the subject is found in United States v. Rivera, --- F.2d --- (2nd Cir., March 13th, 1975), sl.op. p.2263. See, also, Federal Rules of Evidence, Sec. 801(d), effective July 2nd, 1975.

introduction of the questioned testimony for the ostensibly "limited purpose" of impeachment was so highly prejudicial that Appellant was denied his right to a fair trial.

Over objection,[11] the Government was allowed to examine Miss Willis as to conversations with law enforcement officers concerning the actual bank robbery. (T 302ff) It is immediately apparent that this subject was far more crucial than the content of the Grand Jury testimony which simply indicated that Willis overheard a conversation among "five men", three of whom were unidentified, regarding a "bank messenger who carried some sums of money." (A 15) Despite the Trial Court's admonition that this testimony was not admissible for "proving guilt or innocence" but only with respect to the credibility of the witness, the fact remained that through this examination, the jury was to hear the Government's most explosive testimony.[12]

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[11] (T 129 - 130, 135 - 136, 297 - 298)

[12] Apparently frustrated by the Court's ruling, it was Appellant's trial counsel who requested this limiting instruction. (T 301) Shortly thereafter, this procedure was explained in colloquy with the Court: "MR. LA ROSSA: Just for one moment before the jury comes in, I want the record to clearly be understood that my request for a limiting instruction was only because Your Honor had ruled against my opposition to the entire procedure, and I was taking the lesser of the two evils. (Footnote continued next page)

After the limiting instruction, the following testimony was elicited:

"Q Do you recall, Miss Willis, going to the Yorktown Police Department on the 17th of September, 1973?

A Yes.

Q And do you recall meeting with Detective - a Detective Fielding at that police station at that time?

And isn't it true you told Detective Fielding that Daniel Jordano and Anthony Muffucci had been in your apartment about a week prior to that and that you had overheard them talking that they were going to rob a bank on Central Avenue and Tuckahoe Road in the city of Yonkers on Friday morning?

A No, I never said such a thing.

Q You deny that you told him that?

A That's right. I deny it.

Q And if he were to testify that you

(Footnote 12 continued) I do not believe that the procedure was correct. That is the only reason I asked for it. I was not joining into the procedure.

THE COURT: Mr. La Rossa, I'm sure that your opposition to the procedure is clear on the record.

MR. LA ROSSA: I just wanted to be sure." (A 37 - 38)

did say that, it is your testimony that he would be mistaken?

MR. LA ROSSA: Objection.

A That's right.

THE COURT: The objection is overruled."
(A 29 - 30)

With regard to Special Agent Hahn of the Federal Bureau of Investigation:

Q Do you recall telling Agent Hahn on that day that Danny Jordano and a close associate of the individuals were definitely the individuals responsible for setting up the robbery of the bank messenger of the Yonkers Savings Bank in Yonkers, New York, in September of 1973?" (A 32)

* * * *

"Q Miss Willis, did you tell Agent Hahn that Danny Jordano had told you he was responsible for the bank robbery of the Yonkers Savings Bank?

A No, I did not." (A 36)

* * * *

"Q The question is, if Agent Hahn were to testify that you told him Danny Jordano had told you he was responsible for the bank robbery, then Agent Hahn would be mistaken?

A That's right. He may have misunderstood me." (A 37)

Willis' testimony was undoubtedly the dramatic highpoint of this trial.[13/] The damage which resulted from these pragmatically rethorical questions was inestimable. The subsequent testimony of Agent Hahn and Detective Fielding, however, stretched this evidence well beyond the point where its effect as affirmative evidence could be salvaged by the Court's limiting instruction.

Agent Lewis R. Hahn was permitted, over objection (A 121), to testify to an interview of Nancy Willis on October 9th, 1973. After a "limiting instruction" (A 123), the following testimony was elicited:

> "Q Can you tell us, please, Agent Hahn, what, if anything, Nancy Willis told you solely with respect to whether or not Daniel Jordano participated in the robbery of the Yonkers Savings Bank on September 21st, 1973? And restrict your answer only to that information, if any.
>
> A Well, she said that Danny Jordano was her boyfriend until recently when they had a falling out, and that through conversation she had ascertained that Danny Jordano was responsible for setting up

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13/ The entire testimony is contained in transcript pages 292 through 391. (A 20 - 119)

the robbery of the Yonkers Savings Bank.

Q Did she tell you who that conversation was with?

A Well, some of it was with her and some she overheard, she was present at the time. It was a combination." (A 125)

Edgar Fielding, the Yorktown police detective, stated that on September 18th, 1973, he interviewed Nancy Willis. (A 132)

"Q During the course of that interview did Nancy Willis indicate anything to you about the possibility of bank robbery taking place that Friday and her boyfriend, Daniel Jordano, being involved?

A Yes, sir, she did." (A 133)[14/]

14/ This interview took place on September 18th, three days before the robbery. On the basis of this complaint, Daniel Jordano was interviewed by the detective that same evening. (A 136) The detective never saw Daniel Jordano again. (A 137) Therefore, to accept the Government's version, the jury would have to believe that Appellant was confronted by a police official and yet robbed the bank despite this fact. This incredible circumstance illustrates the danger of admitting the hearsay statements in this case. Fielding's interview with Jordano certainly cast doubt on the accuracy of Willis' September 18th report. There is nothing in the record to indicate that when she spoke to Agent Hahn on October 9th, 1973, that her information was any more reliable. Yet, it is this information which may well have convicted the defendants.

Appellant's first argument is that there was an improper foundation on which to impeach Nancy Willis. Prior to the "impeachment" testimony, examination of Miss Willis pertained to the subject matter of her testimony before the Grand Jury. As stated, Willis repudiated this testimony by stating that she had no recollection of such a conversation. (A 25) There was here, in view of a similar course of testimony at the prior trial, no element of surprise. Nor did this repudiation do any affirmative damage to the Government's case. In short, the Government attorney well knew what he was doing. He knew that Willis would repudiate her earlier statements. He knew that her prior Grand Jury testimony would be admitted as affirmative evidence under United States v. De Sisto, supra. He further knew that by proceeding in this manner, he would open his own door and under the cloak of "impeachment", walk through with the most damaging testimony that the Government had to offer.

This Court's decision in United States v. Cunningham, 446 F.2d 194 (2nd Cir., 1971) is in point. Referring to an earlier decision in Taylor v. Baltimore & Ohio R.R., 344 F.2d 281, 283 (2nd Cir., 1965), this Court again observed that:

> "[t]he maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised,"

and

> "Where the witness gives no testimony injurious to the party calling him, but only fails to render the assistance which was expected by professing to be without knowledge on the subject, there is no reason or basis for impeachment. [Kuhn v. United States, 24 F.2d 910, 913 (9th Cir., 1928)]"

As in Cunningham, it was here concededly proper for the Government attorney to attempt to refresh the witness' recollection by reminding her of her alleged statements to Fielding and Hahn. On the other hand, the interrogation of Agent Hahn and Detective Fielding was, like the interrogation of Agent Swayze in Cunningham, clearly improper. Here, too, this testimony "did not constitute allowable impeachment..." 446 F.2d at p.194. The witness, Willis, as the witness Trumpler in Cunningham, simply failed to help the prosecution case. Unlike the witness Possas in United States v. Pacelli, 470 F.2d 67 (2nd Cir., 1972), Willis was not an integral part of the conspiracy whose denial constituted testimony "against the government's case." Here, again, as in Cunningham, the answer went beyond the cancellation of Willis' adverse answer and

elicited testimony which became affirmative proof notwithstanding the limiting instructions. Although this Court affirmed the convictions in Cunningham, the District Judge in that case instructed the jury to disregard the questioned testimony as opposed to an instruction that the jury may use this testimony for a limited but not easily definable purpose. As this Court stated in Cunningham:

> "...the issue whether the declarent ever made the statement requires resolution of a swearing contest between himself and the police." 446 F.2d at p.198.

This was exactly the situation at bar. Resolution of this issue created the forbidden "trial within a trial." See, United States v. Mallah, 503 F.2d 971, 977 (2nd Cir., 1974).[15/]

In United States v. Robinson, 503 F.2d 208 (7th Cir., 1974), the Court stated that:

15/ Less than one year after the Cunningham decision, this Court decided United States v. Briggs, 457 F.2d 908 (2nd Cir., 1972). While Briggs held that statements of this type may be used for impeachment purposes, that case did not involve the contemporaneous admission of Grand Jury testimony as affirmative proof; thereby requiring the jury to make an impossible distinction.

> "It is an established rule that when a witness' testimony is 'merely negative' and 'not damaging to the examiner, but merely disappointing,' the witness may not be impeached by showing a prior inconsistent extra-judicial statement that would be favorable to the examiner. Citing Mc Cormick, Evidence, pp.71-72 (2d.Ed., 1972); Taylor v. Baltimore & Ohio R.R. Co., 344 F.2d 281, 283-285 (2nd Cir., 1965)." 503 F.2d at p.217.

The necessary predicate for impeachment, therefore, was simply not present in the case at bar. See, United States v. Allsup, 485 F.2d 287 (8th Cir., 1973).

As stated in United States v. Davis, 487 F.2d 112, 123 (5th Cir., 1973):

> "...the government may not use the prior inconsistent statement for the purpose of supplying anticipated testimony."

See, also, United States v. Hill, 481 F.2d 929 (5th Cir., 1973). This is precisely what the Government did here. The Government opened the door and "drove the statement home." United States v. Dobbs, 448 F.2d 1262 (5th Cir., 1971). See, Doss v. United States, 431 F.2d 601, 604 (9th Cir., 1970) quoting from Bushaw v. United States, 353 F.2d 477, 481 (9th Cir., 1965):

> "A party 'is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of [a] witness, by

> calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.' Kuhn v. United States, 9th Cir., 1928, 24 F.2d 910, 913."

This Court's decision in United States v. Mingoia, 424 F.2d 710 (2nd Cir., 1970) provides a useful comparison to the case at bar. In Mingoia, a Government witness, Paulsen, was declared hostile and impeached by the Government with prior statements before the Grand Jury and to the Federal Bureau of Investigation. However, Paulsen was one of the key figures in the Government's case. If his prior statements were true, he stole the checks which were the basis of the prosecution under Title 18, United States Code, Section 2314. There was, therefore, a valid predicate for impeachment. But even in Mingoia, there is no indication that the F.B.I. agents were permitted to actually testify and engage in a swearing contest with Paulsen. In any case, the Mingoia Court recognized the potential prejudice of the F.B.I. statements being admitted as affirmative evidence. The Court noted, however, that:

> "Those statements contained the same material as his Grand Jury testimony."

In the case at bar, the "non-affirmative impeachment testimony" of the F.B.I. agent and Detective Fielding went

well beyond the "affirmative" evidence in this case, the Grand Jury testimony referred only to key phrases overheard in a conversation between the two defendants and three unidentified persons. (A 14 - 19) The "impeachment testimony" constituted an unparalleled assertion that Appellant and his alleged cohorts were the actual perpetrators of the crime. In the recent Rivera decision, this Court impliedly recognized the danger where the unsworn statement goes beyond that contained in the Grand Jury testimony. Sl.op. p.2273, footnote 11.

II

The first prong of Appellant's attack was that there was an improper foundation to impeach Nancy Willis. This contention rests, at least in part, upon an allegation that with regard to the questioned statements, the witness did not damage the Government's case but rather did not supply the anticipated help. Simply stated, she should not have been impeached in this manner. Later testimony of Nancy Willis, as previously noted, established an alibi defense for the Appellant, Daniel Jordano. This, of course, did damage the Government's case. Assuming arguendo that the Government was entitled to impeach Nancy Willis, it is submitted that the manner of impeachment

was so prejudicial as to deprive Appellant of his right to a fair trial. Here, again, the Government was permitted to go beyond cancelling out an adverse answer to the point of introducing evidence which affirmatively helped the Government's case. As stated in United States v. Miles, 413 F.2d 34, 37 (3rd Cir., 1969):

> "...the impeachment examination must be reasonably calculated to rehabilitate the government's case without unnecessarily prejudicing the defendant's."

The Miles Court, in a factual setting strikingly similar to that at bar, stated that:

> "Whether or not the United States should have had some opportunity to impeach this witness, we do not decide; because, it is clear that the examination, as conducted, was impermissibly broad and inexcusably prejudicial." 413 F.2d at p.38

In Miles, as in the instant case, the Trial Court gave cautionary instructions to consider the statements "as impeachment material only..." The Circuit Court found, however, that these instructions did not adequately dispell the prejudicial effect of the Government's line-by-line reading of the witness' prior statement. In the case at bar, live testimony of the law enforcement officers, the creation of a swearing contest, was even more damaging. As noted above, it constituted

perhaps the most devastating evidence in the case. It is inconceivable that the Trial Court's limiting instructions, including the instructions contained in the Court's charge, would have prevented the jury from considering this evidence as evidence of the defendants' guilt. In his final instructions, the Court stated that:

> "As to any witness who denied the truth of the earlier statement, you may consider the statement only as it effects the witness' credibility, with one exception:
>
> If the earlier inconsistent statement was made under oath before a Grand Jury, you may consider the truth or falsity of its content even though the witness has not affirmed its truth." (A 148)

It is utterly impossible to believe that with the dramatic impact of Hahn's and Fielding's testimony, the jury was able to follow this instruction. In fact, the very first note sent to the Court after the jury was ordered to deliberate, contained a request that Fielding's and Willis' testimony be reread in its entirety. (A 183)

As Judge Learned Hand once stated, this limiting instruction was a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody elses."

Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir., 1932). See, Bruton v. United States, 391 U.S. 123 (1968). It is here not possible, as a practical matter, to imagine the jury's having isolated the credibility of Nancy Willis as a subject of interest separate from the "genuinely ultimate issue as to Appellant's activities." United States v. Kaplan, --- F.2d --- (2nd Cir., October 15th, 1974), sl.op. p.5791, rehearing den'd. February 19th, 1974, sl.op. p.1689.

Here, as in United States v. Torres, 503 F.2d 1120 (2nd Cir., 1974), the jury could have well gotten the "implication that the impeachment testimony was affirmative evidence despite the judge's prior limiting instruction." Plainly stated, if Willis was to be impeached, it should not have been done in this manner. The emphasis necessarily caused by the testimony of Hahn and Fielding pragmatically prohibited the jury from making the requisite evidentiary distinction. This conviction could well have rested on hearsay and should, therefore, be reversed.

STATEMENT PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Appellant, Daniel Jordano, respectfully joins and

adopts by reference all arguments raised on behalf of his co-Appellants insofar as they are applicable to him and not inconsistent with the arguments raised in this brief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of Conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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